Friday, July 12.

SECOND DIVISION.

[Lord Cullen, Ordinary.

HOWIE *v.* AILSA SHIPBUILDING COMPANY.

Reparation — Negligence — Relevancy — Owner's Liability for Dangerous Explosive—Absence of Averment as to Exact Cause of Explosion — Invitation to Public.

In an action for damages the pursuer averred that his son, a young child, had been permitted to enter and remain in the shipyard of the defenders. While there three barrels of naphtha in a highly explosive and dangerous condition, which had been placed on a lorry for removal, exploded and killed the child. The pursuer's averments did not explain how the explosion actually happened, and did not state that it was due to a cause for which the defenders were responsible.

Held that there was not a relevant averment of fault on the part of the defenders, and action *dismissed.*

Opinion reserved as to whether the action was not also irrelevant, on the ground that the defenders had no duty with regard to the safety of the child, since he had no right to be in the yard.

Robert Howie, mason, Troon, *pursuer*, brought an action against the Ailsa Shipbuilding Company, Troon, *defenders*, for £300 damages for the death of his son.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 22nd November 1911 the pursuer's son William Howie, aged seven years, went to the defenders' premises in the company of an employee of the Glasgow and South-Western Railway Company named Andrew Cousar. Cousar had occasion to go to defenders' yard to remove goods on the defenders' instructions, and he took pursuer's son into the said yard and left him upon the lorry in order that he might go to defenders' office adjoining the yard to transact business. . . . Defenders' servants allowed pursuer's son to enter the yard and remain there with the said lorry. (Cond. 3) On the instructions of the defenders or one of their employees for whom they are responsible, three barrels, alleged to be empty, were placed upon the said lorry for removal. The said barrels, however, contained a considerable quantity of naphtha, and were in a highly explosive and dangerous condition, with the result that an explosion occurred, and one of the barrels burst and struck the pursuer's son and killed him. . . . (Cond. 4) The said accident was caused by the fault of the defenders or of their servants, for whom they are responsible, in respect that they caused the said barrels to be placed upon the lorry in the dangerous condition described. Naphtha is well-known to be an extremely dangerous explosive, and barrels which have contained it, after being emptied, should be kept in a safe place for a period of at least eight days to allow the naphtha fumes to disappear. This is the ordinary precaution adopted for the safety of the public, but no such precaution was taken by the defenders as regards the three barrels in question. Had the defendants or their servants even inspected the said barrels, they would have seen that they contained naphtha fumes in considerable density. The defenders or their servants were further in fault in respect that the said barrels were despatched with a hole in each of about two and a half inches diameter. The said holes should have been filled with plugs to prevent air from mixing with any fumes that might remain in the barrels. The absence of this necessary precaution greatly increased the risk of explosion. The defenders' statements in answer are denied."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and wanting in specification, the action should be dismissed."

On 7th June 1912 the Lord Ordinary (CULLEN) approved of an issue for the trial of the cause.

The defenders reclaimed, and argued—(1) The pursuer's averments of fault on the part of the defender were lacking in specification and insufficient. No explanation was given or suggestion made as to how the accident happened. There was no averment that it was anyone for whom the defenders were responsible who had caused the barrels to explode. (2) The child had no business to be on defenders' premises, and being where he had no business to be he took all risks himself—*Indermaur* v. *Dames*, 1866, L.R., 1 C.P. 274, *affd.* 1867, L.R., 2 C.P. 311, *per* Kelly (C.B.) at p. 312; *Smith* v. *Saint Katherine Docks Company*, 1868, L.R., 3 C.P. 326, *per* Bovill (C.J.) at p. 331; *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, *per* Lord Kinnear at p. 134 and 135, 40 S.L.R. 92, at p. 95; *Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, *per* Lord President at p. 1149, 46 S.L.R. 758, *per* Lord President at p. 760; *Ivay* v. *Hedges*, 1882, L.R., 9 Q.B.D. 80; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312, 24 S.L.R. 237.

Argued for the pursuer and respondent—(1) The pursuer's averments of fault on the part of the defenders were specific and sufficient. The fault consisted in having the barrels in a dangerous condition, and since the accident causing the injury was the work of a moment, it was not necessary to aver and prove exactly how it happened—*Macarthur* v. *Dominion Cartridge Company*, [1905] A.C. 72, *per* Lord Macnaghten, at p. 77. It was enough for the pursuer to aver initial fault on the part of the defenders, and if the immediate cause of the accident was the fault of some-one else that was for the defenders to prove—*Dominion Natural Gas Company, Limited* v. *Collins & Perkins*, [1909] A.C. 640, *per* Lord Dunedin at pp. 646 and 647; *Britannic Merthyr Coal Company, Limited* v. *David*, [1910] A.C. 74. *Williams* v. *Great Western*

Railway Company, 1874, L.R., 9 Ex. 157, and *M'Grath* v. *Glasgow Coal Company, Limited*, [1909] S.C. 1250, 46 S.L.R. 890, were also referred to. (2) The child did not take the risk of injury by being in the defender's yard. An owner is responsible for injuries arising from the keeping of explosives—Clerk and Lindsell on Torts (5th ed.), at pp. 109 and 452—and that whether the explosives were kept in a public or a private place—*Cooke* v. *Midland Great Western Railway Company of Ireland*, [1909] A.C. 229, *per* Lord Macnaghten at p. 234, and Lord Atkinson at pp. 237 and 239; *Lowery* v. *Walker*, [1911] A.C. 10, *per* Lord Halsbury at p. 13; *Galloway* v. *King*, June 11, 1872, 10 Macph. 788, 9 S.L.R. 500; *Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, 35 S.L.R. 42. Moreover, in this case the child had been permitted by the defenders' servants to enter the yard and remain there, as the pursuer averred, and even if he were there illegitimately he was not a trespasser, since he was there without any moral fault on his part.

At advising—

LORD DUNDAS—This is an action of damages brought by a man whose pupil son has been unfortunately killed by an accident. The defenders are a limited company carrying on business as shipbuilders and engineers in Troon. It seems that on a certain day in November 1911 this little boy was taken to the defenders' yard by a man named Andrew Cousar, who was an employee of the Glasgow and South-Western Railway Company. Cousar went to the yard to remove goods on the defenders' instructions, and he took the boy with him—I suppose as a pleasuring for the little lad. He left him upon the lorry in order that he might go to the defenders' office adjoining the yard to transact business. Then we have article 3 of the condescendence. It is here, I think, that the pursuer's record is radically irrelevant. He says that on the instructions of the defenders or one of their employees for whom they are responsible, three barrels, alleged to be empty, were placed upon the lorry for removal. So far so good. "The said barrels, however, contained a considerable quantity of naphtha, and were in a highly explosive and dangerous condition, with the result that an explosion occurred, and one of the barrels burst and struck the pursuer's son and killed him." The part of this sentence beginning "with the result" seems to me to be an entire *non sequitur* of what goes before it. It stands to reason and is matter of common knowledge that barrels of naphtha standing upon a lorry could not in themselves be a source of danger unless somehow or other a light were applied to them. But how that light came to be applied, or by whom, there is no averment whatever to show. I think in a case of this sort it is incumbent upon the pursuer at all events to set forth some feasible statement of how the accident occurred, and this the pursuer has, in my judgment, entirely failed to do. He makes no attempt to explain or account for the ignition which was the proximate cause of the accident, or to connect it in any way with the defenders. His averments do not even exclude (except by a bare denial) the account offered by the defenders' answer, which seems a probable enough one. On these short, but to my mind conclusive, grounds I am for throwing this action out as irrelevant.

I do not desire, for my own part, to enter into, or to express any definite opinion upon, the other matter which was argued, viz., that this unfortunate little boy had no right to be where he was—on a lorry in this private yard—and that the case may be irrelevant on that ground also. I can see that the pursuer might have great difficulty in convincing the Court of the relevancy of the action upon this aspect of it. But the ground upon which I prefer to rest my opinion is quite sufficient if it is well founded.

I am sorry that the Lord Ordinary did not give us the benefit of his views in the shape of an opinion, because I am not able to conjecture for myself why he should have allowed an issue upon this record.

LORD SALVESEN—I am of the same opinion and on the same grounds. I think it is not enough for the pursuer to aver that the explosion occurred with the result that the pursuer's son was killed. He must show in some way that the proximate cause of the explosion, to wit, the ignition of the explosive mixture contained in the naphtha barrel, was due to some cause for which, or to some person for whom, the defenders are responsible.

It may be that he has excluded the defenders' theory of the accident by denying that the boy used any matches or himself ignited the explosive mixture; but he has not excluded other possibilities, such as, for instance that a mischievous lad, knowing that such barrels contained an explosive mixture, deliberately ignited the barrel. I cannot conceive that if such a thing were done on private premises belonging to the defenders they would be responsible for what would really be an act of malicious mischief. But a cause of this kind is not excluded by the pursuer's record—indeed, there is no theory presented as to how the explosion occurred. For all that appears one might have imagined that the framer of the record thought that a mixture of naphtha fumes and air would explode spontaneously. Now, of course, we all know that that is not so, and that a light must be applied to such a mixture before it can produce damage.

On that short and simple ground I am for recalling the Lord Ordinary's interlocutor, although I am not at all sure that I would not have done so on the mere ground that this boy was not legitimately in the premises where, on the assumption of the pursuer, dangerous articles were stored. They had no reason to anticipate that the boy would be in their premises at all, nor had they any duty in regard to the

boy, who chanced to come there without their consent, and certainly without their invitation, express or implied.

LORD GUTHRIE—I agree that the case fails, as your Lordships have put it, through the absence of connection in the way of averment between the defenders' alleged fault and the accident. The nature of the material is important. The words used in the condescendence are "an extremely dangerous explosive," but these words cannot be used in a technical sense. This was not in a technical sense an explosive, because it was not an explosive within the meaning of the Explosives Act 1875 (38 and 39 Vict. c. 17). If it had been, then the mere possession of explosive material of more than a certain amount would of itself have been sufficient to make the defenders responsible if an explosion occurred, even without any averment of direct negligence to infer fault. But the material is not of that nature, and it is not denied, although the record does not admit it, that without the application of light it is perfectly safe.

I do not know that there was any necessity for the pursuer averring either exactly how the accident occurred or who applied the light. It might have been sufficient if he had averred that the place where barrels with a certain residuum of naphtha in them were placed was a place where they were bound to anticipate that lights would be, or would probably be, encountered. But in fact the accident took place in broad daylight, and there is no suggestion that there was any reason whatever to anticipate that any light would be met with in this particular place.

On the other question of the legal category under which the boy fell at the time, it does seem to me that the pursuer, on his own averment, discloses what would be a sufficient ground for holding the action irrelevant, because he states that the place where the accident happened was in the defenders' yard, that is, an enclosed place. He might in the way of averment have made his case relevant if he had said that this place was a place where the public, and in particular children, were allowed habitually to resort; but all he says is that the defenders' servants allowed the pursuer's son to enter the yard and remain there on the lorry.

He does not even say that they saw him come in on the lorry. He merely says that he was not stopped from coming into the yard. That raises the question whether it can be said that he was legitimately there. Mr Watt said he might be legitimately there, but still if he were reasonably there without any moral fault on his part he was not a trespasser. I am not aware that a person can be in any place except either legitimately or illegitimately; and if he is illegitimately there it is difficult to see that he is not in the position of a person who goes there at his own risk. But it is enough, as your Lordships have said, to decide the case on the first question.

LORD JUSTICE-CLERK—I am of the same opinion. As regards the latter question I agree with what has been said by Lord Guthrie. The case will be dismissed, and with expenses.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Defenders and Reclaimers—Horne, K.C.—J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Pursuer and Respondent—Watt, K.C.—Duffes. Agents—Mackay & Young, W.S.

Friday, July 12.

SECOND DIVISION.

[Sheriff Court at Cupar.

WEMYSS COAL COMPANY, LIMITED *v.* SYMON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Out of and in the Course of the Employment.*"

A message-clerk who was sent a message by his employers, and had been provided with money to pay his tramway fare, was seriously and permanently injured while attempting to board, a short distance from its stopping-place, a car which was moving at the rate of five miles an hour. He acted without invitation and contrary to a notice on the car, of which he was aware. The arbiter having awarded him compensation, *held*, in a stated case, that the accident did not arise out of and in the course of his employment.

John Kirk Symon, Buckhaven, with the advice and consent of his father Frank Symon, as his curator and administrator-in-law, *respondent*, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the Wemyss Coal Company, Limited, *appellants*, the matter was referred to the arbitration of the Sheriff-Substitute at Cupar (ARMOUR HANNAY), who found the respondent entitled to compensation, and at the request of the appellant stated a Case for appeal.

The Case stated—"(1) The claimant on 29th October 1910, being the date of the accident after mentioned, was fourteen years of age, and had been employed as message clerk in the appellants' service at their Muiredge office for about five months prior thereto.

"(2) On said date he was sent a message from the appellants' Muiredge office to the appellants' head office at East Wemyss, which is situated westwards from Muiredge, and was given money to pay his tram-car fares both ways.

"(3) The tramway line runs alongside the public road, and is properly fenced off